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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81632; File No. SR-GEMX-2017-42]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Fees to Offer Monthly Subscriptions for Open and Close Trade Profile Information

September 15, 2017

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 1, 2017, Nasdaq GEMX, LLC (“GEMX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information.

The text of the proposed rule change is available on the Exchange’s Website at www.ise.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information; subscriptions will be available for both end-of-day and intraday updates.³

The Open/Close Trade Profile provides over 80 fields of trading and volume data for GEMX-listed options that can be used to create and test trading models and analytical strategies. Trade Profile data includes: "Origin Code" (the type of trader participating in the transaction);⁴

³ The Exchange initially filed this proposal as a fee filing on August 25, 2017 (SR-GEMX-2017-41). The proposal was rejected on August 31, 2017, and is being resubmitted as a proposal that (i) does not significantly affect the protection of investors or the public interest, and (ii) does not impose any significant burden on competition under Exchange Act Rule 19b-4(f)(6)(iii).

⁴ "Origin Code" categories include Customer, Professional Customer, Firm and Market Maker. "Customer" applies to any transaction identified by a member or a member organization for clearing in the Customer range at the Options Clearing Corporation which is not for the account of a broker or dealer or a Professional. A "Professional Customer" is a high-activity customer that enters into more than 390 orders per day over the course of a one-month period. A "Firm" is a broker-dealer trading in its own proprietary account or on behalf of another broker-dealer. A "Market Maker" is a broker-dealer that assumes the risk of holding a position in a series to facilitate trading.

opening and closing buys and sells;⁵ trading volume and number of trades categorized by day and series;⁶ the degree to which a series is “in” or “out” of the “money”;⁷ the number of days to expiration; an indication of the degree to which there is “Open Interest”⁸ for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole.

The GEMX Open/Close Trade Profile is currently available as an historical database available upon request, and the Exchange proposes to offer intraday and end-of-day subscriptions to Trade Profile information as well. Such subscriptions will be available to both members and non-members, similar to the ISE Open/Close Trade Profile.⁹ The end-of-day file is updated overnight and available for download the following morning. The intraday file is updated at 10 minute intervals to provide a cumulative record of transactions that take place over

⁵ An opening buy is a transaction that creates or increases a long position and an opening sell is a transaction that creates or increases a short position. A closing buy is a transaction made to close out an existing position. A closing sell is a transaction to reduce or eliminate a long position.

⁶ Trading volume is the number of contracts traded; the number of trades is the number of transactions.

⁷ The degree to which a series is “in” or “out” of the “money” is identified according to the following five levels of “moneyness”: (i) “Deep in the Money” means that the strike price of this option is more than 12% lower than the price of the underlying security if it is a call or more than 12% higher if it is a put; (ii) “In the Money” means that the strike price of this option is within the range of 5%-12% lower than the price of the underlying security if it is a call or within the range of 5%-12% higher if it is a put; (iii) “At the Money” means that the strike price of this option is within the range of 5% higher or lower than the price of the underlying security; (iv) “Out of the Money” means that the strike price of this option is within the range of 5%-12% higher than the price of the underlying security if it is a call or 5%-12% lower if it is a put; and (v) “Deep out of the Money” means that the strike price of this option is more than 12% higher than the price of the underlying security if it is a call or more than 12% lower if it is a put.

⁸ “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.

⁹ Nasdaq ISE Rulebook, Fee Schedule, Chapter VIII (Market Data), A (offering an annual subscription to Nasdaq ISE Open/Close Trade Profile End of Day for \$759 per month) and B (offering a monthly subscription to the Nasdaq ISE Open/Close Trade Profile Intraday for \$2,000 per month).

the course of the trading day. The end-of-day subscription will be available for \$500 per month; the intraday subscription will be available for \$1,000 per month.

The proposed rule change will increase transparency in the market by increasing the amount of information available to market participants to assist them in making investment decisions related to GEMX-listed options.

The proposed fees are optional in that they apply only to firms that elect to purchase these products. The changes do not impact the cost of any other GEMX product.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹¹ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The proposal is to make open and close trade profile information, currently available only on an historical basis, available at 10 minute intervals over the course of the trading day and in summary form at the end of the trading day, thereby increasing the flow of information and removing impediments to a free and open market.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

important to investors and listed companies.”¹²

Likewise, in NetCoalition v. Securities and Exchange Commission¹³ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁴ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁵

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....”¹⁶ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that adding the proposed subscriptions to the Exchange’s Open/Close Trade Profile is reasonable and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. The

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹³ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁴ See NetCoalition, at 534 - 535.

¹⁵ Id. at 537.

¹⁶ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

proposed changes will increase transparency by providing information about options activity throughout and at the end of the trading day. The proposed fees, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow, and are subject to competition from other options exchanges. As explained in further detail below, the proposal will impose no burden on competition because GEMX transaction information is disseminated by the Options Price Reporting Authority, LLC ("OPRA"), and customers would not pay a premium for GEMX information when similar transaction information is available at a lower cost from OPRA, and because the price of GEMX proprietary data is constrained by the need for GEMX to compete for order flow. The Exchange further notes that GEMX Open/Close Trade Profile information is an optional service that only applies to firms that elect to purchase the product. Moreover, the proposed service is similar to services already provided by other exchanges, such as the ISE Open/Close Trade Profile.¹⁷

The proposed changes are an equitable allocation of reasonable dues, fees, and other charges because fees will be the same for all of the purchasers of each product and it is equitable to charge more for the intraday product—which provides updates at 10 minute intervals over the course of the trading day—than the end-of-day product, which provides updates once per day.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes will allow the Exchange to offer intraday and end-of-day subscriptions to options

¹⁷ Nasdaq ISE Rulebook, Fee Schedule, Chapter VIII (Market Data), A (offering an annual subscription to Nasdaq ISE Open/Close Trade Profile End of Day for \$759 per month) and B (offering a monthly subscription to the Nasdaq ISE Open/Close Trade Profile Intraday for \$2,000 per month).

trading data. If the price of the proposed subscriptions were to be set above a competitive price, the Exchange may lose revenue as a result.

GEMX market data fees are constrained by competition among exchanges and other entities seeking to attract order flow, and the existence of substitutes that are offered, or may be offered, by other entities. Order flow is the “life blood” of the exchanges. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade, as demonstrated by the proliferation of new options exchanges such as EDGX Exchange and MIAX Options within the last four years. Each options exchange is permitted to produce proprietary data products.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with GEMX and other exchanges. Data fees are but one factor in a total platform analysis. If the cost of the product exceeds its expected value, the prospective customer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products.

The price of options data is also constrained by the existence of multiple substitutes offered by a number of entities, and non-proprietary data disseminated by OPRA. OPRA is a securities information processor that disseminates last sale reports and quotations, as well as the number of options contracts traded, open interest and end-of-day summaries. Many customers that obtain information from OPRA do not also purchase proprietary data, but in cases in which customers buy both products, they may shift purchasing decisions based on price changes.

OPRA constrains the price of proprietary data products on options exchanges because no customer would pay an excessive price for these products when they already have data from OPRA. Similarly, no customer would pay an excessive price for Exchange data when they have the ability to obtain similar proprietary data from other exchanges. It is not necessary that products be identical in order to be reasonable substitutes for each other.

As such, the price of the GEMX Open/Close Trade Profile product is constrained by other exchanges in the competition for order flow and the availability of similar data from OPRA. Customers choose exchanges based on the total cost of interacting with the exchange; if the GEMX Open/Close Trade Profile were set above market price, the total cost of interacting with GEMX would be above market price, and GEMX would lose market share as a result. In addition, the availability of trading information from OPRA will constrain the price of the GEMX Open/Close Trade Profile because customers would not pay an excessive amount for proprietary data when similar information is available at a lower price; two products need not be identical for each product to act as a constraint on the price of the other. For these reasons, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time

as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁹

A proposed rule change filed under Rule 19b-4(f)(6)²⁰ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²¹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay. The Exchange notes that a product similar to the proposed product is already being sold by another exchange. The Exchange also asserts that the addition of the proposed product can increase competition, and will not harm firms that do not purchase the product as the service is optional. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.²²

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or

¹⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁰ 17 CFR 240.19b-4(f)(6).

²¹ 17 CFR 240.19b-4(f)(6)(iii).

²² For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

(iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-GEMX-2017-42 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-GEMX-2017-42. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F

Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2017-42 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Eduardo A. Aleman,

Assistant Secretary.

²³ 17 CFR 200.30-3(a)(12).

